

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 4, 2000 Session

**THE CITY OF JOHNSON CITY, TENNESSEE v.
ERNEST D. CAMPBELL, ET AL.**

**Appeal from the Law Court for Washington County
No. 19637 Jean A. Stanley, Judge**

FILED FEBRUARY 9, 2001

No. E2000-01345-COA-R3-CV

The City of Johnson City filed a petition for condemnation seeking to take a small parcel of property owned by Ernest D. Campbell and Nancy Campbell for a public park. Prior to filing its petition, Johnson City's Board of Commissioners passed a resolution to begin condemnation proceedings against the Campbells. Johnson City's charter states that Johnson City shall have the power of eminent domain by ordinance but does not provide specifically for this power by resolution. The Campbells asked that the Trial Court dismiss the condemnation petition. The Trial Court denied this request to dismiss, finding that under the language of the municipal charter, Johnson City was not required to pass an ordinance to commence condemnation proceedings and that Johnson City properly initiated its condemnation suit by filing a petition pursuant to Tenn. Code Ann. § 29-16-104. This matter then proceeded to a jury trial wherein the only issue was the value of the Campbells' property. The Campbells appeal. We reverse the Trial Court's determination that the City of Johnson City was not required to pass an ordinance in the exercise of its power of eminent domain as pled in its petition for condemnation.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Law Court Reversed;
Case Remanded.**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and HERSCHEL P. FRANKS, J., joined.

Thomas C. Jessee, Johnson City, Tennessee, for the Appellants, Ernest D. Campbell and Nancy Campbell.

James D. Culp and James H. Epps, IV, Johnson City, Tennessee, for the Appellee, The City of Johnson City, Tennessee.

OPINION

Background

In February 1998, Ernest D. Campbell and Nancy Campbell (“Defendants”) purchased a small parcel of property (“Lot”) in a historic neighborhood known as the “tree streets” of Johnson City, Tennessee. The Lot was approximately thirty three-hundred square feet, and Defendants purchased it with plans to build a small rental house. Thereafter, Defendants obtained a building permit from the City of Johnson City (“Plaintiff”) and a variance from Plaintiff’s Board of Zoning Appeals. Defendants then began construction of the home which alarmed other residents of the “tree streets.” Plaintiff’s Board of Commissioners held two meetings in January and February 1999, during which it heard the residents’ opposition. On February 4, 1999, the Board of Commissioners passed a resolution (“Resolution”) in which they agreed to attempt negotiations with Defendants and if not successful, to proceed with filing a condemnation petition. The Resolution also stated that “[Plaintiff] should maintain the [Lot] as a public green space until such time as the Board may direct otherwise. . . .”

On February 8, 1999, Plaintiff filed a petition for condemnation (“Petition”) in which it alleged that the taking was necessary to “assure orderly development compatible with its Historic Zoning Overlay District, as well as to provide public green space in the form of a small park. . . .” The Petition provided that Plaintiff was filing the action under § 7.10 of its municipal charter, Tenn. Code Ann. § 29-16-101, et seq., and “all other applicable statutes which provide for the right to exercise the power of eminent domain.”

The section of Plaintiff’s municipal charter relied on by Plaintiff in its Petition provides as follows:

Sec. 7. Generally.

That said municipal corporation, in addition to the powers, rights and authority vested in it by the preceding articles and sections, shall have the power by ordinance:

* * * * *

§ 7.10. *Eminent domain.* To condemn property, real or personal or any easement, interest or estate or use therein, either within or without the city, for present or future public use; such condemnation to be made and effected in accordance with the terms and provisions of sections 3109-3132 of the Code of Tennessee [T.C.A. §§ 29-16-101 – 29-16-124], or in such other manner as may be provided by law.

(alteration in original).

The statutory section cited in Plaintiff's Petition and referenced in § 7.10 of the charter, Tenn. Code Ann. § 29-16-101, provides the following:

Any person or corporation authorized by law to construct any railroad, turnpike, canal, toll bridge, road, causeway, or other work of internal improvement to which the like privilege is conceded, may take the real estate of individuals, not exceeding the amount prescribed by law, or by the charter under which the person or corporation acts, in the manner and upon the terms herein provided.

In their Answer, Defendants requested that the Petition be dismissed because it failed to state a cause of action under Tenn. Code Ann. § 29-16-104, which sets forth the necessary elements of a condemnation petition. In November 1999, the Trial Court heard Defendants' motion to dismiss. At the hearing, Plaintiff entered as exhibits a copy of § 7 of its municipal charter and the minutes from its Board of Commissioners' meeting where it passed the Resolution. § 7 is the only charter provision contained in the record on appeal. The Trial Court denied Defendants' motion to dismiss. In its Memorandum Opinion and Order, the Trial Court held that Plaintiff, in the exercise of its eminent domain power, is not required to pass an ordinance but that it may commence condemnation proceedings by filing a petition as provided in Tenn. Code Ann. § 29-16-104. The Trial Court found significant the language of § 7.10 of the municipal charter which allows for condemnation "to be made and effected . . . in such other manner as may be provided by law." The Trial Court also rejected Defendants' argument that Plaintiff's decision to condemn the Lot was arbitrary and capricious. Thereafter, a jury trial was held wherein the sole issue was the value of the Lot. Defendants appeal.

Discussion

On appeal, Defendants raise the following issues: 1) whether the Trial Court erred in finding as a matter of law that Plaintiff was not required to pass an ordinance before proceeding with its condemnation suit; 2) whether the Trial Court erred in determining that Plaintiff's decision to condemn Defendants' property was not arbitrary and capricious; and 3) whether the Trial Court erred in allowing the testimony and report of Plaintiff's expert property appraisal witness, Beth Ledbetter, because she failed to appraise the Lot as of the date of the taking.

The Trial Court's findings of fact are subject to *de novo* review by this Court with a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Alexander v. Inman*, 974 S.W.2d 689, 692 (Tenn. 1998). As for the Trial Court's conclusions of law, this Court will conduct a *de novo* review with no presumption of correctness. *See Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

With respect to the Trial Court's admission of Beth Ledbetter's testimony, we find that this issue is not properly before this Court. Defendants failed to raise this issue in a Motion for New Trial, and as a result, waived this issue for purposes of appeal. *See* Tenn. R. App. 3(e); *Flynn v.*

Shoney's, 850 S.W.2d 458, 461 (Tenn. Ct. App. 1992); *Boyd v. Hicks*, 774 S.W.2d 622, 627-28 (Tenn. Ct. App. 1989).

The issue of whether Plaintiff was required to pass an ordinance before proceeding with its condemnation suit against Defendants requires further discussion. The Tennessee Constitution sets forth the eminent domain provision as follows:

That no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor.

Tenn. Const. art. I, § 21. This constitutional provision affords the state government the power of eminent domain. *City of Chattanooga v. Classic Refinery*, No. 03A01-9712-CV-0552, 1998 WL 881862, at * 3 (Tenn. Ct. App. Dec. 17, 1998). In explaining the government's power of eminent domain, our Supreme Court characterized it as "the power to take private property without the consent of the owner" but also as a power limited by our state constitution which prohibits "the taking of private property for private purposes, and by requiring just compensation when private property is taken for public use." *Jackson v. Metro. Knoxville Airport Auth.*, 922 S.W.2d 860, 862 (Tenn. 1996).

Furthermore, the power of eminent domain is "dormant and requires legislative action declaring the objects to which, and the mode and agency through which, the power shall move." *Tr. of New Pulaski Cemetery v. Ballentine*, 271 S.W. 38, 39 (Tenn. 1925). Counties and municipalities are provided the power of eminent domain by the state legislature. *Classic Refinery*, 1998 WL 881862, at * 3; *see also New Pulaski Cemetery*, 271 S.W. at 39 (holding that the dormant power of eminent domain must be awakened by a "valid" statute). In addition, this Court has held that the power of eminent domain "will not pass by implication but is limited, both as to the exercise of the power and quantum of property or estate acquired, by the express terms or clear implication of the statute." *Rogers v. City of Knoxville*, 289 S.W.2d 868, 871 (Tenn. Ct. App. 1955). Also, statutes which provide the power of condemnation are to be strictly construed against the party seeking condemnation. *Claiborne County v. Jennings*, 285 S.W.2d 132, 134 (Tenn. 1955).

We hold that because Plaintiff, in its Petition, relies upon § 7.10 of its charter, which, in turn, references Tenn. Code Ann. § 29-16-101, et seq., the Trial Court erred in holding that Plaintiff was not required to pass an ordinance before proceeding with the filing of its condemnation suit. Following the hearing on Defendants' motion to dismiss, the Trial Court held that Plaintiff was not required to pass an ordinance before initiating condemnation proceedings since § 7.10 provides that Plaintiff may do so "in such other manner as may be provided by law." The Trial Court determined that under that language, Plaintiff properly initiated its condemnation suit by filing a petition, pursuant to Tenn. Code Ann. § 29-16-104. We agree that Tenn. Code Ann. § 29-16-104 provides the procedure for "such condemnation to be made and effected. . . ." We hold, however, that since Plaintiff, in its Petition, relies upon § 7.10 of its charter as the basis to exercise its power

of eminent domain, it was required to exercise this power by ordinance. *See Rogers v. City of Knoxville*, 289 S.W.2d at 871; *Claiborne County v. Jennings*, 285 S.W.2d at 134.

As a municipality, Plaintiff has been provided the power to condemn private property for public use through various pieces of legislation. *See, e.g.,* Tenn. Code Ann. § 7-31-107; § 7-34-104(a)(1); § 11-24-102; § 29-16-101; § 29-17-201; § 29-17-801. Plaintiff's municipal charter, Chapter 189, 1939 Private Acts of Tennessee, also furnishes it eminent domain power. *City of Johnson City v. Cloninger*, 372 S.W.2d 281, 282 (Tenn. 1963); *City of Memphis v. Hastings*, 86 S.W. 609, 612-13 (Tenn. 1904).

Even though Plaintiff has been provided the power to condemn private property for public use through various pieces of legislation, it chose, in its Petition, to rely upon §7.10 of its municipal charter, which references Tenn. Code Ann. § 29-16-101, *et seq.*, as the basis of its power to condemn this particular piece of property. Under Plaintiff's argument, the Petition leaves Defendants with uncertainty as to the theory upon which Plaintiff relies for its authority to condemn Defendants' Lot. Property owners, such as Defendants, do not have to guess, anticipate, or extrapolate as to the theory upon which Plaintiff wishes to proceed to condemn their property. This Court has held that "[t]he petition should not leave any uncertainty as to the theory on which the pleader wishes to proceed." *Roane County v. Christmas Lumber Co.*, No. E1999-00370-COA-R9-CV, 2000 WL 1035943, at * 3 (Tenn. Ct. App. July 27, 2000) (quoting 61A Am.Jur.2d *Pleading* § 81 (1999)). Plaintiff had the obligation to see that its Petition left no uncertainty as to the theory upon which it was proceeding to condemn Defendants' property. Plaintiff, in its Petition, relied upon §7.10 of its charter which references Tenn. Code Ann. §29-16-101, *et seq.* There was no amendment to this Petition. There was no other specific statute or charter provision cited by Plaintiff as the basis for its power to condemn Defendants' property. Therefore, Plaintiff's authority to condemn Defendant's property, under the Petition filed, is limited by the language of §7.10.

According to the plain language of § 7.10, Plaintiff must pass an ordinance when relying upon that particular charter provision as the source of its eminent domain power. *See Ray ex rel. Holman v. BIC Corp.*, 925 S.W.2d 527, 532 (Tenn. 1996) holding that the Court must "give effect to 'every word, phrase, clause and sentence . . .'". The initial clause of § 7 provides the phrase that "[Plaintiff] shall have the power by ordinance . . .," which is completed by the first clause of § 7.10, "[t]o condemn property. . . ." Thereafter, the second clause of § 7.10 sets forth the procedure that Plaintiff is to utilize when exercising the power of eminent domain as follows: "to be made and effected in accordance with the terms and provisions of . . . [T.C.A. §§ 29-16-101 – 29-16-124], or in such other manner as may be provided by law." (alteration in original). Accordingly, when Plaintiff relies upon § 7.10 as the source of its power to condemn private property, Plaintiff must follow the mandate of § 7 that an ordinance be passed to exercise this power.

Plaintiff argues it was not required to pass an ordinance before beginning condemnation proceedings against Defendants because it has multiple sources granting it the power of eminent domain, including other city charter and statutory provisions. Plaintiff contends that it derives its authority from two other charter provisions: § 2 which outlines Plaintiff's general powers

and provides that Plaintiff has the power to “sue and be sued . . . in all actions whatsoever . . .,” and § 18 which sets forth the general manner in which Plaintiff may exercise its powers and states that “the board of commissioners may by ordinance or resolution not inconsistent with this charter prescribe the manner in which any powers of the city shall be exercised. . . .”

§ 7.10, unlike §§ 2 and 18 of the charter, specifically addresses Plaintiff’s power of eminent domain, and “[s]pecific statutory provisions generally prevail over general provisions when there is a conflict between statutes.” *Brewer v. Lincoln Brass Works*, 991 S.W.2d 226, 229-30 (Tenn. 1999). Plaintiff’s argument that §§ 2 and 18 of its charter somehow allow Plaintiff to proceed by resolution rather than ordinance would effectively nullify the language of § 7. Plaintiff apparently contends that it had the authority under §§ 2 and 18 of its charter to condemn property by either resolution or ordinance even without recourse to §7. We disagree. The specific language of § 7.10 controls. Plaintiff’s argument depends upon an expansive interpretation of its power of condemnation, rather than its power of condemnation being strictly construed as is the law of this state. *See Claiborne Co. v. Jennings*, 285 S.W. 2d at 134.

Furthermore, although § 18 of Plaintiff’s charter treats resolutions and ordinances interchangeably, the two have “distinct meanings.” *Joe Cooper’s Café v. City of Memphis*, No. 02A01-9209-CH-00269, 1993 WL 54606, at * 3 (Tenn. Ct. App. Mar. 3, 1993). In *Joe Cooper’s Café*, this Court explained:

A resolution is a mere expression of the opinion of the mind of the City Council concerning some matter of administration coming within its official cognizance. *See* 56 Am.Jur.2d *Municipal Corporations* § 344 (1971). A resolution of a city council is of a temporary nature, while an ordinance is of a permanent nature. *See* 19 Tenn.Jur. *Municipal Corporations* § 46 (1985). ‘An ordinance of a municipal corporation is a local law, and a regulation of a general, permanent nature.’ 56 Am.Jur. at § 343. ‘Ordinances are rules or regulations adopted by municipal corporations in pursuance of powers granted by the law of the land.’ 19 Tenn.Jur. at § 46.

Id.

Additionally, Plaintiff’s municipal charter’s requirement of an ordinance defines the boundaries of Plaintiff’s eminent domain authority as provided by its charter. *See Rogers v. City of Knoxville*, 289 S.W.2d at 871; *City of Lebanon v. Baird*, 756 S.W.2d 236, 241 (Tenn. 1988). Our Supreme Court in *City of Lebanon v. Baird*, held that “municipalities may exercise only those express or necessarily implied powers delegated to them by the Legislature in their charters or under statutes.” *Id.* at 241. The *Baird* court further discussed the purpose of a municipal charter’s requirement of an ordinance as follows:

[the purpose of the requirement is] consistent with . . . ‘a fundamental goal of our system of government that, to the extent possible, we be governed by laws rather than men,’ . . . [and] is to assure that the citizens of the municipality are adequately aware of the proposed action, its particular nature and costs, and are given an opportunity to voice their support or their opposition to the action in advance of the city’s commitment to it.

Id. (quoting *Brooks v. Garner*, 566 S.W.2d 531, 532 (Tenn. 1978)). Furthermore, “‘if the power to pass ordinances upon any subject is specifically given, the power so granted cannot be enlarged or changed by the general clause’” *Id.* (quoting *Mayor and City Council of Nashville v. Linck*, 80 Tenn. 499, 508 (1883)).

We are aware of the opinion by our Supreme Court, *City of Johnson City v. Cloninger*, in which the Court reviewed the issue of whether Johnson City’s condemnation of private property for a municipal golf course was for public use. *Cloninger*, 372 S.W.2d at 283-84. In *Cloninger*, Johnson City passed a resolution, not an ordinance, in which it decided to exercise its eminent domain power. *Id.* at 282. Although the Court cited to § 7.10 of the charter as a source of Johnson City’s eminent domain power, the Court did not discuss the issue of whether Johnson City should have passed an ordinance, instead of a resolution, to exercise its condemnation power because that issue was not before the Court. *Id.* Unlike *Johnson City v. Cloninger*, our decision turns on whether Plaintiff could exercise its eminent domain power by resolution, rather than by ordinance, despite its reliance in its Petition for Condemnation upon § 7.10 as the source of its eminent domain power. Therefore, we believe that *City of Johnson City v. Cloninger* does not control the outcome of this case as this issue was not then before the Court.

Accordingly, because Plaintiff in its petition relied upon § 7.10 of its charter for its power of condemnation, we hold that the Trial Court erred in finding that Plaintiff was not required to pass an ordinance before it began condemnation proceedings against Defendants. Plaintiff’s charter provision which provides the power of eminent domain, § 7.10, clearly states that when deciding to exercise its eminent domain power under that section, Plaintiff “shall have the power by ordinance. . . .” Consequently, we hold that since Plaintiff relied upon § 7.10 of its charter in its Petition as authority to take Defendants’ Lot, the Trial Court’s denial of Defendants’ motion to dismiss was in error.

It is important to note that we do not hold that Plaintiff’s power of eminent domain is limited to § 7.10 of its charter. Further, we do not hold that Plaintiff always must proceed by ordinance in the exercise of its power of eminent domain. We hold only that Plaintiff must proceed by ordinance if it relies upon § 7.10 of its charter as the basis for its power of eminent domain.

Due to our holding in this matter, it is not necessary to address Defendants’ remaining issue on appeal regarding the Trial Court’s finding that Plaintiff’s decision to condemn the Lot was not arbitrary and capricious.

Conclusion

The judgment of the Trial Court is reversed and this cause remanded for further proceedings as may be required, if any, consistent with this Opinion, and for collection of the costs below. Costs of this appeal are taxed to the Appellee, the City of Johnson City.

D. MICHAEL SWINEY, JUDGE